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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/732,726	12/10/2003	William T. Ball	5564-152	2017
22442	7590	01/30/2008		
SHERIDAN ROSS PC 1560 BROADWAY SUITE 1200 DENVER, CO 80202			EXAMINER FETSUGA, ROBERT M	
			ART UNIT 3751	PAPER NUMBER
			MAIL DATE 01/30/2008	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Application Number: 10/732,726
Filing Date: December 10, 2003
Appellant(s): BALL, WILLIAM T.

MAILED
JAN 30 2008
Group 3700

Timothy J. Zarley
For Appellant

SUPPLEMENTAL EXAMINER'S ANSWER

This is in response to the "remand" entered October 17, 2007 into the record of the noted application (pgs. 16-17 of "BPAI Decision"). The original examiner's answer was in response to the appeal brief filed March 27, 2006 appealing from the Office action mailed October 24, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Application serial no. 10/326,449, filed by appellant December 20, 2002, involves plugging an overflow drain system to allow for leak testing. A final rejection in the application was appealed (no. 2006-2338) resulting in the examiner's decision being affirmed.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is deficient. 37 CFR 41.37(c)(1)(v) requires the summary of claimed subject matter to include: (1) a concise explanation of the subject matter defined in each of the independent claims involved in the

appeal, referring to the specification by page and line number, and to the drawing, if any, by reference characters and (2) for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The brief is deficient because at the end of the first paragraph, reference is made to sealing a thin diaphragm 26A over the waste water port 28, but such subject matter is not found at page 7, lines 14-16 and page 6, lines 15-25 as stated by appellant. Moreover, at the end of the second paragraph, reference is made to physically cutting open diaphragm 26A, but such subject matter is not found at page 7, line 30 thru page 8, line 3 and page 9, lines 7-16 as stated by appellant.

(6) Grounds of Rejection to be Reviewed on Appeal

NEW GROUND(S) OF REJECTION

Whether the subject matter of claim 10 is obvious over a combination of prior art references.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,618,875	Oropallo et al.	09/2003
2002/0032926	Lewis	03/2002
5,890,241	Ball	04/1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lewis, Ball and Oropallo et al. The Oropallo et al. (Oropallo) reference is considered prior art under 102(e) with respect to the filing date of the instant CIP application. The Lewis reference (Fig. 3a) discloses a method (claim 19) comprising: a bathtub 30 including bottom, side and end walls (illustrated), an overflow port (receiving 23), and a drain system 11; and an overflow fitting 20 including an upper end portion having threads 23, a lip (illustrated), and a nut 21. Therefore, Lewis teaches all claimed elements except for the overflow fitting including a diaphragm and cap. Although the overflow fitting of the Lewis drain system does not include a diaphragm, as claimed, attention is directed to the Ball reference which discloses an analogous drain system which further includes an overflow fitting 34 having a diaphragm 64. Therefore, in consideration of Ball, it would have been obvious to one of ordinary skill in the drain system art to associate a diaphragm with the Lewis overflow fitting in order to facilitate testing. Although the overflow fitting of the Lewis drain system does not include a cap, as claimed, attention is directed to the Oropallo reference which discloses an analogous drain system which further includes an overflow fitting 11 having a

cap 10. Therefore, in consideration of Oropallo, it would have been obvious to one of ordinary skill in the drain system art to associate a cap with the Lewis overflow fitting in order to conceal same.

(10) Response to Argument

Applicant's arguments with respect to claim 10 at page 10 of the brief have been considered but are moot in view of the new ground(s) of rejection.

(11) Evidence Appendix

No evidence is identified by appellant.

(12) Related Proceedings Appendix

Copies of the court or Board decision(s) identified in the Related Appeals and Interferences section of this examiner's answer are provided herein.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section (9) above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).


Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

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Respectfully submitted,

Robert M. Fetsuga



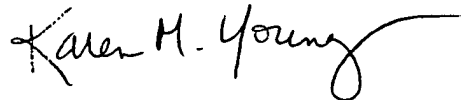
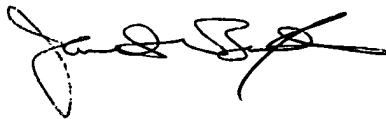
A Technology Center Director or designee must personally
approve the new ground(s) of rejection set forth in section (9)
above by signing below:

Conferees:

Gregory L. Huson



Janet C. Baxter



KAREN M. YOUNG
DIRECTOR
TECHNOLOGY CENTER 3700